

1 **IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO**

2 Opinion Number: _____

3 Filing Date: AUGUST 2, 2011

4 **NO. 30,285**

5 **STATE OF NEW MEXICO,**

6 Plaintiff-Appellant,

7 v.

8 **JEROME D. BLOCK, a/k/a JEROME D.**
9 **BLOCK II and JEROME D. BLOCK, JR.,**
10 **and JEROME D. BLOCK, a/k/a JEROME**
11 **D. BLOCK, SR.,**

12 Defendants-Appellees.

13 **APPEAL FROM THE DISTRICT COURT OF SANTA FE COUNTY**

14 **Michael E. Vigil, District Judge**

15 Gary K. King, Attorney General

16 Andrew S. Montgomery, Assistant Attorney General

17 Santa Fe, NM

18 for Appellant

19 Rothstein, Donatelli, Hughes, Dahlstrom,

20 Schoenburg & Bienvenu, LLP

21 Daniel Philip Estes

22 Carolyn M. "Cammie" Nichols

23 Albuquerque, NM

COURT OF APPEALS OF NEW MEXICO
ALBUQUERQUE
FILED

AUG 02 2011

San H. Montoya

1 Freedman, Boyd, Hollander, Goldberg,
2 Ives & Duncan, PA
3 Zachary A. Ives
4 Theresa M. Duncan
5 Albuquerque, NM

6 for Appellees

7 James Harrington
8 Santa Fe, NM

9 for Amicus Curiae Common Cause

OPINION

FRY, Judge.

{1} The secretary of state assessed fines against Jerome Block, Jr., (Block Jr.) for violations of the New Mexico Voter Action Act (the Act), NMSA 1978, Sections 1-19A-1 to -17 (2003, as amended through 2007), which provides public financing for certain candidates running for political office. The attorney general then filed criminal charges against Block Jr. and his father, Jerome Block, Sr. (Block Sr.), for violations of the Act. The district court dismissed the charges, holding that the attorney general may not initiate prosecution under the Act unless the secretary of state refers the violations to the attorney general for that purpose. We reverse the dismissal because the Act does not limit the attorney general's authority to prosecute. We also reject Block Jr.'s argument that prosecution following fine assessment violates principles of double jeopardy.

BACKGROUND

I. The Voter Action Act

{2} Enacted in 2003 as part of our comprehensive Election Code, the Act has not been analyzed in any prior case, and our review is thus a matter of first impression. To frame our discussion, we begin by providing a brief overview of the Act's relevant statutory provisions. The Act established a public campaign finance scheme for the

1 purpose of financing the election campaigns of candidates running for various public
2 offices in New Mexico. Sections 1-19A-2 to -17. Toward that end, the Act created
3 a “public election fund” for the purpose of “financing the election campaigns of
4 certified candidates for covered offices.” Section 1-19A-10(A)(1).

5 {3} Under the Act, candidates who are interested in obtaining public financing
6 must undergo a certification process that is administered by the office of the secretary
7 of state. Sections 1-19A-3 to -6, -16. Upon certification, candidates become eligible
8 to receive distributions from the public election fund during the election cycle and,
9 in return, they are required to comply with all requirements of the Act. Section 1-
10 19A-6(C). These requirements include, among others, using disbursed funds only for
11 campaign-related purposes, limiting total campaign expenditures to the amounts
12 distributed from the public election fund, refraining from seeking contributions from
13 any other source, and returning any unspent or unencumbered money to the public
14 election fund at the time a person ceases to be a candidate. Section 1-19A-7. The
15 candidate must also report campaign-related expenditures to the secretary of state in
16 accordance with the campaign reporting requirements specified in the Act as well as
17 in other portions of the Election Code. Section 1-19A-9. The Act charges the
18 secretary of state with administering the Act’s statutory provisions and directs the

1 secretary of state to adopt rules to “ensure effective administration of the [Act].”
2 Section 1-19A-15(A).

3 {4} This appeal concerns Section 1-19A-17, the sole penalties provision of the Act.
4 This section prescribes penalties for violations of the Act, including a civil penalty
5 of up to \$10,000 per violation in Subsection (A) and a criminal penalty in Subsection
6 (B) for a willful or knowing violation that is punishable as a fourth degree felony.
7 Sections 1-19A-17(A), (B). In addition, candidates who violate the Act “may” be
8 required to return money disbursed to their campaigns from the public election fund
9 under Subsection (A) and “shall” be required to return such money under Subsection
10 (B). *Id.* We address this provision in detail in our discussion.

11 **II. Factual and Procedural History**

12 {5} The underlying facts of this case stem from Defendant Block Jr.’s campaign
13 for the office of commissioner of the New Mexico Public Regulation Commission
14 during the 2008 election cycle. During the primary and general elections that year,
15 Block Jr. ran as a certified candidate for office pursuant to the Act and, as a result, he
16 was authorized to receive public campaign financing from the public election fund.
17 Approximately \$101,508 was disbursed to Block Jr.’s campaign from the public
18 election fund throughout the 2008 election cycle.

1 **A. The Secretary of State's Investigation and Assessment of Civil Fines**
2 **Against Block Jr.**

3 {6} On October 4, 2008, amid news reports that Block Jr. had allegedly
4 misappropriated funds disbursed to him from the public election fund, the secretary
5 of state initiated a preliminary inquiry into possible violations by Block Jr.'s
6 campaign of the Act and the Campaign Reporting Act, NMSA 1978, Sections 1-19-25
7 to -36 (1979, as amended through 2009), both of which are closely situated statutory
8 chapters within the Election Code. After a series of communications between the
9 secretary of state and Block Jr. regarding the investigation into the purported
10 violations, the secretary of state issued a notice of final action on November 1, 2008,
11 in which she levied three fines totaling \$11,000 against Block Jr. for three separate
12 violations of the Act and the Campaign Reporting Act. In addition to the fines, the
13 secretary of state required Block Jr. to return \$10,000 of the \$101,508 previously
14 disbursed to his campaign from the public election fund and also to return a \$700
15 donation made by Block Jr. from the disbursed funds. In sum, Block Jr. was required
16 to pay a total of \$21,700 to the secretary of state as a result of the three violations.

17 {7} Although the secretary of state determined that the three fines totaling \$11,000
18 resulted from violations of both the Act and the Campaign Reporting Act, we
19 describe the three violations only in the context of the Act for purposes of our
20 discussion. The first fine levied by the secretary of state, in the amount of \$5,000,

1 was based on a violation of Section 1-19A-9(D) of the Act for the “failure to
2 accurately and truthfully report” a campaign expenditure. *See* § 1-19A-9(D)
3 (requiring certified candidates under the Act to “report expenditures according to the
4 campaign reporting requirements specified in the Election Code”). This fine
5 corresponded to Block Jr.’s failure to correctly report a \$2,500 payment to a musical
6 group for rally entertainment that the group never actually provided.

7 {8} The second fine, also in the amount of \$5,000, was based on a violation of
8 Section 1-19A-7(D) of the Act for “improper use in the general election cycle of
9 public funds earmarked for the primary election.” *See* § 1-19A-7(D) (stating that “[a]
10 certified candidate shall return to the secretary, within thirty days after the primary
11 election, any amount that is unspent or unencumbered by the date of the primary
12 election for direct deposit into the [public election] fund”). The secretary of state
13 found that Block Jr. had failed to return the \$2,500 paid to the musical group,
14 although that amount should have been previously returned to the secretary of state’s
15 office within thirty days of the primary election. The third fine, in the amount of
16 \$1,000, was based on a violation of Section 1-19A-7(A) of the Act for the use of
17 disbursed public election funds for non-campaign related purposes. *See* § 1-19A-
18 7(A) (stating that “[a]ll money distributed to a certified candidate shall be used for
19 that candidate’s campaign-related purposes in the election cycle in which the money

1 was distributed"). This fine corresponded to a \$700 contribution by Block Jr. from
2 the funds disbursed to his campaign in order to help retire a former presidential
3 candidate's campaign debt.

4 {9} The secretary of state's notice of final action indicated that a copy of the notice
5 was transmitted to the office of the New Mexico Attorney General. On appeal, the
6 parties agree that aside from sending a copy of the notice to the attorney general's
7 office, the secretary of state made no express decision to refer the matter to the
8 attorney general for criminal prosecution. During the proceedings below, the
9 secretary of state stated that any decision as to whether a criminal prosecution should
10 be initiated for violations of the Act was beyond her statutory purview and area of
11 expertise and that her office did not make any kind of referral to the attorney
12 general's office for criminal prosecution.

13 **B. Criminal Proceedings Against Block Jr. and Block Sr.**

14 {10} On April 8, 2009, approximately five months after the secretary of state's final
15 action against Block Jr., a grand jury indicted Block Jr. for: (1) two counts of
16 willfully or knowingly violating the Act and other provisions of the Election Code
17 (Counts 1 and 3), (2) two counts of conspiracy to commit violations of the Act and
18 other provisions of the Election Code (Counts 2 and 4), (3) one count of tampering
19 with evidence, (4) one count of conspiracy to commit tampering with evidence, and

1 (5) two counts of embezzlement over \$500 but not more than \$2,500. On the same
2 date, a grand jury indicted Block Jr.'s father, Defendant Block Sr. for: (1) one count
3 of willfully or knowingly violating the Act and other provisions of the Election Code
4 (Count 1), (2) one count of conspiracy to commit a violation of the Act and other
5 provisions of the Election Code (Count 2), (3) one count of tampering with evidence,
6 and (4) one count of conspiracy to commit tampering with evidence. Pursuant to
7 Rule 5-203(B) NMRA, the charges against Block Jr. and Block Sr. (collectively,
8 Defendants) were joined.

9 {11} Subsequently, Defendants moved to dismiss specific counts in the indictments.

10 Defendants initially filed a joint motion in district court to dismiss all charges brought
11 under the Act, arguing that the attorney general lacked statutory authority to initiate
12 criminal proceedings for violations of the Act. Defendants asserted that the attorney
13 general's broad authority to prosecute criminal cases under NMSA 1978, Section 8-5-
14 2 (1975), was limited by the Act. Specifically, Defendants contended that the plain
15 language of the Act's penalties provision requires the attorney general's office to
16 receive a referral from the secretary of state prior to initiating criminal prosecutions
17 for violations of the Act. Because no such referral allegedly occurred in this case,
18 Defendants argued that the attorney general lacked the authority to prosecute the
19 charges brought under the Act. In addition to this joint motion, Block Jr. separately

1 moved to dismiss three specific counts of the indictment—1 and 2 (both for violations
2 of the Act), and 7 (for embezzlement)—on double jeopardy grounds. Specifically,
3 Block Jr. argued that the fines levied by the secretary of state constituted criminal
4 punishment for purposes of the double jeopardy clause of the New Mexico
5 Constitution and therefore precluded a successive criminal prosecution for the same
6 conduct.

7 {12} After a hearing on both motions, the district court issued an order granting the
8 joint motion filed by Defendants as well as the separate motion filed by Block Jr. The
9 court determined that the plain language of the Act’s penalties provision permitted
10 “the secretary of state to *either* impose a fine if she or he finds a violation of the [Act]
11 *or* transmit a finding of a violation to the attorney general for prosecution, *but not*
12 *both*.” (Emphasis added.) The court reasoned that the attorney general lacked the
13 statutory authority to prosecute violations of the Act without a prior referral from the
14 secretary of state and, further, that “had the Legislature intended to allow the attorney
15 general to exercise his or her usual broad authority to initiate criminal charges
16 without the secretary of state having [first] transmitted findings of a violation, it
17 would have said so.” Because the secretary of state had levied fines and also testified
18 at the hearing that she did not make a referral to the attorney general’s office, the
19 court held that the attorney general lacked prosecutorial authority to initiate criminal

1 proceedings against Defendants for violations of the Act. On this basis, the court
2 dismissed all charges brought for violations of the Act against both Defendants.

3 {13} The district court further determined, as a separate and alternate ground
4 supporting dismissal, that all charges brought under the Act violated Block Jr.'s state
5 constitutional protections against double jeopardy. The court found that legislative
6 intent behind the Act authorized imposition of either a civil penalty or criminal
7 prosecution, but not both and, therefore, the prior issuance of civil penalties in this
8 case precluded any subsequent criminal prosecution for the same underlying conduct.

9 The court further reasoned that the civil penalties levied by the secretary of state
10 constituted criminal punishment because they were more punitive than remedial in
11 nature and that any subsequent criminal charges brought under the Act for conduct
12 previously punished through the civil penalties resulted in a violation of double
13 jeopardy. Accordingly, the district court dismissed all charges brought under the Act
14 against Block Jr., with the order specifically referencing Counts 1-4. This appeal
15 followed. The district court granted a stay of all further proceedings pending
16 resolution of this appeal.

17 **DISCUSSION**

18 {14} On appeal, the State contends that the district court erroneously determined
19 that: (1) the attorney general has no authority to prosecute criminal violations of the

1 Act without a prior referral from the secretary of state, and (2) double jeopardy
2 precludes criminal prosecution for violations of the Act based on the same conduct
3 for which the secretary of state has previously assessed a civil penalty. These issues
4 hinge on our interpretation of Section 1-19A-17, the penalties provision of the Act.
5 We address each issue in turn.

6 **I. Attorney General's Authority to Prosecute Criminal Violations of the Act**

7 {15} We begin by examining the basic statutory grant of authority to the attorney
8 general. In New Mexico, the attorney general has no common law powers; instead,
9 his/her duties are determined entirely by statute. *State v. Davidson*, 33 N.M. 664,
10 669, 275 P. 373, 375 (1929). The basic statutory grant of authority to the attorney
11 general is set forth in NMSA 1978, Section 8-5-2(B) (1975), which provides in
12 relevant part that: "Except as otherwise provided by law, the attorney general shall
13 . . . prosecute and defend in any other court or tribunal all actions and proceedings,
14 civil or criminal, in which the state may be a party or interested when, in his [or her]
15 judgment, the interest of the state requires such action." Section 8-5-2(B). Thus,
16 "Section 8-5-2 provides authority for the [attorney general] to prosecute criminal
17 cases in any court when the [s]tate's interest requires such action," but that authority
18 may be limited or conditioned where the Legislature has "otherwise provided by law."

1 *State v. Koehler*, 96 N.M. 293, 295, 629 P.2d 1222, 1224 (1981) (internal quotation
2 marks omitted).

3 {16} The first issue is whether the Legislature has “otherwise provided” in Section
4 1-19A-17 for a limitation on the attorney general’s authority to initiate criminal
5 prosecutions for violations of the Act. The district court construed Section 1-19A-17
6 to limit the attorney general’s authority to initiate criminal proceedings under the Act
7 to only the circumstance where a prior referral has been received from the secretary
8 of state. In addition, the district court construed the word “or” in Section 1-19A-
9 17(A) to be disjunctive and to denote mutually exclusive alternatives—i.e., meaning
10 that the secretary of state shall either impose a fine for a violation or transmit the
11 finding to the attorney general for criminal prosecution, but not both. *See* § 1-19A-
12 17(A) (“If the secretary makes a determination that a violation of [the A]ct has
13 occurred, the secretary shall impose a fine *or* transmit the finding to the attorney
14 general for prosecution.” (emphasis added)). On these grounds, the district court
15 concluded that the attorney general exceeded the scope of his prosecutorial authority
16 under the Act by initiating criminal proceedings against Defendants without first

1 receiving a referral from the secretary of state.¹ Our review of the district court's
2 holding presents issues of statutory construction concerning Section 1-19A-17 of the
3 Act.

4 {17} We apply de novo review to questions of statutory interpretation. *State v.*
5 *Rivera*, 2004-NMSC-001, ¶ 9, 134 N.M. 768, 82 P.3d 939. “The primary aim of
6 statutory construction is to give effect to the intent of the Legislature.” *State v. Lewis*,
7 2008-NMCA-070, ¶ 6, 144 N.M. 156, 184 P.3d 1050 (internal quotation marks
8 omitted). In discerning legislative intent, we are aided by canons of statutory
9 construction, and we look first to the plain language of the statute to determine if the
10 statute can be enforced as written. *See State v. Davis*, 2003-NMSC-022, ¶ 6, 134
11 N.M. 172, 74 P.3d 1064. “Under the plain meaning rule, when a statute’s language
12 is clear and unambiguous, we will give effect to the language and refrain from further
13 statutory interpretation.” *State v. Hubble*, 2009-NMSC-014, ¶ 10, 146 N.M. 70, 206
14 P.3d 579 (internal quotation marks omitted). If, however, the language of the statute
15 is “doubtful, ambiguous, or an adherence to the literal use of the words would lead

16 ¹Because the State conceded below and again at oral argument that the
17 secretary of state did not make a referral to the attorney general in this case, we do not
18 reach the issue of whether the secretary of state’s transmission of the notice of final
19 action to the attorney general—as evidenced by the fact that the notice, on its face,
20 indicated that a copy was sent to the attorney general—constitutes a referral
21 (transmission for prosecution). Although we are not bound to accept the State’s
22 concessions, our holding here does not require us to reach this issue.

1 to injustice, absurdity or contradiction,” we reject the plain meaning rule in favor of
2 construing the statute “according to its obvious spirit or reason.” *Davis*, 2003-
3 NMSC-022, ¶ 6.

4 {18} We begin with the language of Section 1-19A-17, which reads:

5 A. In addition to other penalties that may be applicable, a
6 person who violates a provision of the Voter Action Act is subject to a
7 civil penalty of up to ten thousand dollars (\$10,000) per violation. In
8 addition to a fine, a certified candidate found in violation of that act may
9 be required to return to the fund all amounts distributed to the candidate
10 from the fund. *If the secretary makes a determination that a violation*
11 *of that act has occurred, the secretary shall impose a fine or transmit*
12 *the finding to the attorney general for prosecution.* In determining
13 whether a certified candidate is in violation of the expenditure limits of
14 that act, the secretary may consider as a mitigating factor any
15 circumstances out of the candidate’s control.

16 B. A person who willfully or knowingly violates the
17 provisions of the Voter Action Act or rules of the secretary or
18 knowingly makes a false statement in a report required by that act is
19 guilty of a fourth degree felony and, if he is a certified candidate, shall
20 return to the fund all money distributed to that candidate.

21 Section 1-19A-17 (emphasis added) (citations omitted). Looking at the language, we
22 observe that the attorney general is mentioned only once in the section, as the official
23 recipient of referrals from the secretary of state. Section 1-19A-17(A). There is no
24 language in either subsection that expressly states what the attorney general shall or
25 may do regarding violations of the Act. Subsection (A) specifies only what the
26 secretary of state “shall” or “may” do in administering the Act, without explicitly

1 addressing the attorney general's authority to prosecute criminal violations of the Act.
2 Similarly, Subsection (B) specifies the nature of the criminal penalties available for
3 violations of the Act, again without specifically addressing the attorney general's
4 authority or the procedures by which a criminal prosecution may arise. Defendants
5 have not argued that the Act includes any explicit language limiting the authority of
6 the attorney general; rather, their arguments are focused on construing the word "or,"
7 as mentioned above, as a limitation on the attorney general's prosecutorial authority.
8 {19} Although "[l]egislative silence is at best a tenuous guide to determining
9 legislative intent," *Swink v. Fingado*, 115 N.M. 275, 283, 850 P.2d 978, 986 (1993),
10 the fact remains that there is no express language in Section 1-19A-17 or elsewhere
11 in the Act specifying the nature of or any limit on the attorney general's authority to
12 initiate criminal prosecutions for violations of the Act. We also assume that the
13 Legislature was aware of Section 8-5-2 when it drafted the Act and that, had the
14 Legislature intended for the Act to "otherwise provide" a limitation on the attorney
15 general's authority under Section 8-5-2, it could have included such limiting language
16 in the Act. *See El Vadito de los Cerrillos Water Ass'n v. N.M. Pub. Serv. Comm'n*,
17 115 N.M. 784, 789, 858 P.2d 1263, 1268 (1993) (assuming that the Legislature is
18 aware of existing laws at the time of subsequent legislation). As a result, the attorney

1 general's basic statutory grant of authority in Section 8-5-2 plays an important role
2 in our analysis and cannot be ignored.

3 {20} The district court held that the following language in Section 1-19A-17 acts as
4 a limitation on the attorney general's authority to initiate criminal proceedings against
5 Defendants: "If the secretary makes a determination that a violation of [the Act] has
6 occurred, the secretary shall impose a fine *or* transmit the finding to the attorney
7 general for prosecution." Section 1-19A-17(A) (emphasis added). The district court
8 concluded that the "or" denotes mutually exclusive alternatives and, thus, if the
9 secretary of state elects to issue a fine, as in this case, the attorney general has no
10 authority to commence a prosecution. We are not persuaded that this is a reasonable
11 interpretation of the meaning of Section 1-19A-17(A).

12 {21} The word 'or' in legislative acts is not given its normal disjunctive meaning if
13 it will frustrate evident legislative intent, if adherence to the literal use of the word
14 leads to absurdity or contradiction, and if the context of the section and other statutes
15 read in conjunction with the section call for a different interpretation. *See Swink v.*
16 *Fingado*, 115 N.M. 275, 279 n.10, 850 P.2d 978, 983 n.10 (1993) (indicating that
17 "or" is a conjunction and that "the alternatives are not necessarily mutually
18 exclusive"); *Hale v. Basin Motor Co.*, 110 N.M. 314, 318, 795 P.2d 1006, 1010
19 (1990) ("The word 'or' should be given its normal disjunctive meaning unless the

1 context of a statute demands otherwise.”); *First Nat’l Bank v. Bernalillo Cnty.*
2 *Valuation Protest Bd.*, 90 N.M. 110, 112, 560 P.2d 174, 176 (Ct. App. 1997) (stating
3 that the “ordinary meaning [of ‘or’] should be followed unless it renders the statute
4 doubtful or uncertain”). Courts do not inexorably apply the rule that the use of the
5 disjunctive “or” means only that one of the listed choices can be employed, if a “strict
6 grammatical construction will frustrate evident legislative intent . . . [or] statutory
7 context can render the distinction [between “and” and “or”] secondary.” Yule Kim,
8 Legislative Attorney, American Law Division, Congressional Research Service, *CRS*
9 *Report for Congress, Statutory Interpretation: General Principles and Recent Trends*
10 (Updated August 31, 2008), page 8 (internal quotation marks omitted) (citing cases
11 indicating that “the word ‘or’ is often used as a careless substitute for the word
12 ‘and’”; and that “[b]oth ‘and’ and ‘or’ are context-dependent, and each word ‘is itself
13 semantically ambiguous, and can be used in two quite different senses”); *see also* 1A
14 Norman J. Singer, *Statutes & Statutory Construction* § 21:14, at 185-89 (7th ed.
15 2009) (observing that there has been “such laxity in the use of [the terms ‘and’ and
16 ‘or’]” and then describing cases where courts have found the terms to be
17 interchangeable if this is more consistent with legislative intent). Here, all of these
18 considerations bear on the issue.

1 {22} Section 1-19A-17(A) sends mixed signals and raises questions as to its intent
2 in regard to administrative civil penalties and criminal prosecutions. The section
3 opens with the phrase, “[i]n addition to other penalties that may be applicable.”
4 Construed broadly, this phrase includes civil penalties in other statutes and criminal
5 penalties for violation of criminal laws. Such penalties would include that for a
6 Section 1-19A-17(B) felony. Nothing in Section 1-19A-17(A) indicates a legislative
7 intention to make the secretary of state a gatekeeper with prosecutorial discretion to
8 determine whether probable cause exists to prosecute a Section 1-19A-17(B) felony
9 or whether a felony charge instead of a civil penalty ought to be pursued. Nothing
10 in that section indicates an intent to preclude the attorney general from prosecuting
11 that felony. The more reasonable view of the section is that the administrative
12 penalty was intended as a remedial remedy to cover violations that were neither
13 willful nor knowing, with a prosecution still open for violations that were willful or
14 knowing. We doubt that the Legislature meant the wording in that section to place
15 the secretary of state in an “either/or” straitjacket or by implication to hamstring the
16 attorney general when a felony has been committed. We are unpersuaded that the
17 Legislature would enact a criminal felony proscription intending a violation of it to
18 be rendered unenforceable at the whim of the secretary of state.

{23} The Act contains no express language addressing the authority of the attorney general to act, and Section 1-19A-17 speaks only to the duties of the secretary of state without addressing the authority of the attorney general. Therefore, the language of the Act does not “otherwise provide” for a limitation on the attorney general’s authority under Section 8-5-2 to prosecute criminal violations of the Act. The word “or” in Subsection (A) of Section 1-19A-17 denotes choices that are not mutually exclusive and, as a result, the issuance of a civil penalty does not preclude the possibility of subsequent prosecution.

II. Double Jeopardy Analysis

{24} We next address whether double jeopardy barred the prosecution of Block Jr. due to the previous assessment of civil penalties against him by the secretary of state. On appeal, the State and amicus curiae Common Cause contend that the district court erroneously dismissed Counts 1 - 4 of the indictment against Block Jr. on the alternate ground that double jeopardy barred the imposition of successive civil and criminal penalties under the Act for the same conduct by Block Jr.

{25} Block Jr. concedes that it was error for the district court to dismiss Counts 3 and 4 on double jeopardy grounds because the conduct alleged in these counts was not the same conduct for which Block Jr. was fined. As a result, because there is no dispute that the conduct underlying Counts 3 and 4 and the conduct that resulted in

1 the secretary of state's action concerned separate offenses and therefore was not
2 unitary, we reverse the district court's order as to these two charges.

3 {26} As for the remaining counts, we must determine whether New Mexico's
4 constitutional and statutory double jeopardy provisions bar criminal prosecution
5 under the Act for conduct for which the secretary of state has previously assessed a
6 "civil penalty."² We apply de novo review to this legal question. *See State v. Kirby*,
7 2003-NMCA-074, ¶ 12, 133 N.M. 782, 70 P.3d 772.

8 {27} Because Block Jr. does not assert a violation of the federal double jeopardy
9 clause, our analysis is limited to our state's double jeopardy jurisprudence. The New
10 Mexico Constitution's double jeopardy clause states that "[n]o person shall . . . be
11 twice put in jeopardy for the same offense." N.M. Const. art II, § 15. Similarly, our
12 state double jeopardy statute provides that "[n]o person shall be twice put in jeopardy
13 for the same crime." NMSA 1978, § 30-1-10 (1963). It is well established that these
14 provisions protect "against the imposition of multiple criminal punishments for the

15 ²Our use of the label "civil penalty" throughout the double jeopardy analysis
16 is based on Section 1-19A-17, which refers to the secretary of state's assessment of
17 monetary fines against violators of the Act as a "civil penalty." Section 1-19A-17A
18 (stating that "a person who violates a provision of the . . . Act is subject to a civil
19 penalty of up to ten thousand dollars (\$10,000) per violation" (citation omitted)). We
20 clarify that the secretary of state's assessment of three fines totaling \$11,000 against
21 Block Jr. are the "civil penalties" we refer to throughout our analysis.

1 same offense and then only when such occurs in successive proceedings.” *City of*
2 *Albuquerque v. One (1) 1984 White Chevy Util.*, 2002-NMSC-014, ¶ 7, 132 N.M.
3 187, 46 P.3d 94 (internal quotation marks omitted). In this context, our Supreme
4 Court has recognized that a “legislature may impose both a criminal and a civil
5 sanction in respect to the same act or omission without violating the Double Jeopardy
6 Clause.” *Id.* (internal quotation marks omitted).

7 {28} In *State ex rel. Schwartz v. Kennedy*, our Supreme Court delineated the
8 following three-part framework for determining whether double jeopardy bars
9 successive criminal and civil sanctions for the same conduct: “(1) whether the [s]tate
10 subjected the defendant to separate proceedings[,] (2) whether the conduct
11 precipitating the separate proceedings consisted of one offense or two offenses[,] and
12 (3) whether the penalties in each of the proceedings may be considered ‘punishment’
13 for the purposes of the Double Jeopardy Clause.” 120 N.M. 619, 626, 904 P.2d 1044,
14 1051 (1995). In applying the third *Schwartz* factor, a reviewing court determines
15 whether the penalty constitutes “punishment” by considering (1) the Legislature’s
16 “purpose in enacting the legislation, rather than evaluating the effect of the sanction
17 on the defendant”; and (2) “whether the sanction established by the legislation was
18 sufficiently punitive in its effect that, on balance, the punitive effects outweigh the

remedial effect.” *White Chevy*, 2002-NMSC-014, ¶ 11 (internal quotation marks omitted). We apply the *Schwartz* framework to this case.

A. First and Second *Schwartz* factors: Separate Proceedings and Unitary Conduct

{29} The parties are in agreement regarding the first and second *Schwartz* factors.

With regard to the first *Schwartz* factor, it is uncontroverted that the action by the secretary of state that resulted in the levying of civil penalties against Block Jr. and the subsequent criminal prosecution in district court were two separate proceedings.

As for the second *Schwartz* factor, the State conceded below, and again on appeal, that the conduct underlying Counts 1 and 2 of the indictment against Block Jr. was the same conduct that precipitated the secretary of state’s investigation and assessment of monetary penalties.

B. Third *Schwartz* factor: Whether the Civil Penalty Constitutes “Punishment”

{30} With regard to Counts 1 and 2, the dispositive issue before us is the third *Schwartz* factor—whether the civil penalties levied by the secretary of state against Block Jr. are considered “punishment” for purposes of the double jeopardy clause so as to preclude subsequent criminal prosecution. As stated above, our Supreme Court has stated that courts should determine whether a sanction is “punishment” for double jeopardy purposes by first considering the Legislature’s purpose in enacting the

1 penalty and, second, whether the penalty is so punitive in its effect that, on balance,
2 the punitive effects outweigh its remedial effect. *White Chevy*, 2002-NMSC-014,
3 ¶¶ 8, 11.

4 {31} The district court answered the third *Schwartz* factor in the affirmative,
5 determining that the civil penalties imposed by the secretary of state were more
6 punitive than remedial in nature and that this was sufficient to bar Block Jr.'s
7 subsequent criminal prosecution on double jeopardy grounds. On appeal, we
8 conclude that the district court's determination was incorrect and, accordingly, we
9 reverse the district court's dismissal of Counts 1 and 2 on this basis. As we explain
10 more fully below, our review of legislative intent and the effects of the civil penalty
11 indicates that the civil penalty is not considered "punishment" under the third
12 *Schwartz* factor and, therefore, it does not preclude subsequent criminal prosecution
13 for the same conduct.

14 **1. Legislative Intent**

15 {32} In applying the third *Schwartz* factor, we must first ascertain the Legislature's
16 purpose in enacting the Act and, specifically, Section 1-19A-17. *See Hudson v.*
17 *United States*, 522 U.S. 93, 99 (1997) (explaining that "[w]hether a particular
18 punishment is criminal or civil is, at least initially, a matter of statutory construction"
19 and that "[a] court must first ask whether the legislature, in establishing the penalizing

1 mechanism, indicated either expressly or impliedly a preference for one label or the
2 other” (internal quotation marks and citation omitted)).

3 {33} Although the Act does not specifically enumerate its purposes, it is clear that
4 the Act’s provisions are directed at establishing a public campaign financing system
5 that is subject to considerable oversight by the office of the secretary of state.
6 Sections 1-19A-2 to -17. There is no question that the Act’s provisions establish a
7 regulatory and administrative scheme for the management of public campaign funds.
8 *Id.* This is evidenced by the provisions covering the certification process, Sections
9 1-19A-3 to -6, -16, management of and disbursements from the public election fund,
10 Sections 1-19A-10 to -14, and candidate expenditures and reporting requirements,
11 Sections 1-19A-7 to -9.

12 {34} It is therefore apparent that the Act, as a whole, is directed to a remedial
13 purpose. Its provisions are aimed at protecting against misappropriation of public
14 campaign funds, promoting transparency in campaign expenditures, and protecting
15 the public from deceptive practices by candidates. Also, the Act is part of our state
16 Election Code, a statutory chapter that was enacted with the purpose of “secur[ing]
17 . . . the purity of elections and guard[ing] against the abuse of the elective franchise”
18 and “to provide for efficient administration and conduct of elections.” NMSA 1978,
19 § 1-1-1.1 (1979). The inclusion of the Act within the Election Code further reflects

1 the intent of the Legislature to create a remedial regulatory and administrative scheme
2 for the management of public campaign funds. *Cf. State v. Nunez*, 2000-NMSC-013,
3 ¶ 52, 129 N.M. 63, 2 P.3d 264 (determining that the penalty provisions of the
4 Controlled Substances Act, which is part of the Criminal Code, were punitive in
5 nature because that act “d[id] not concern a regulated lawful activity, but rather an
6 illegal criminal activity”).

7 {35} We also conclude that the civil penalty in Section 1-19A-17 evinces a remedial
8 and regulatory purpose. Under Subsection (A) of Section 1-19A-17, the secretary of
9 state has the authority to impose a civil penalty for violations of the Act, and the
10 secretary of the state may also require a violator to return any funds he/she was
11 disbursed from the public election fund. Subsection (A) also includes language that
12 the imposition of a civil penalty and the return of disbursed funds is “[i]n addition to
13 other penalties that may be applicable.” *Id.* As a result, the civil penalty is one of
14 multiple tools of regulatory and administrative enforcement available to the secretary
15 of state to ensure compliance with the Act. *See Kirby*, 2003-NMCA-074, ¶ 26. This
16 further supports our view that the Legislature intended that the civil penalty
17 “constitute an integral part of an overall remedial regulatory and administrative
18 scheme to protect the public.” *Id.*

2. Balancing of Remedial and Punitive Effects of the Civil Penalty

{36} Having determined that the Act has a remedial purpose, we next address whether the civil penalty “was sufficiently punitive in its effect that, on balance, the punitive effects outweigh the remedial effect.” *Id.* ¶¶ 22, 27 (internal quotation marks omitted). We do so because “[e]ven in those cases where the [L]egislature has indicated an intention to establish a civil penalty,” it is still possible that the Act’s statutory scheme is “so punitive either in purpose or effect, as to transform what was clearly intended as a civil remedy into a criminal penalty.” *Hudson*, 522 U.S. at 99 (alteration omitted) (internal quotation marks and citation omitted).

{37} Our inquiry here centers on a seven-factor, non-exhaustive framework established by the United States Supreme Court in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963), and previously adopted by this Court in *Kirby*:

(1) [w]hether the sanction involves an affirmative disability or restraint; (2) whether it has historically been regarded as a punishment; (3) whether it comes into play only on a finding of *scienter*; (4) whether its operation will promote the traditional aims of punishment-retribution and deterrence; (5) whether the behavior to which it applies is already a crime; (6) whether an alternative purpose to which it may rationally be connected is assignable for it; and (7) whether it appears excessive in relation to the alternative purpose assigned.

Kirby, 2003-NMCA-074, ¶ 28 (alteration in original) (internal quotation marks omitted). As we explain more fully below, upon applying the seven *Mendoza-*

1 *Martinez* factors, we conclude that the civil penalty in the Act is more remedial than
2 punitive in its effect.

3 {38} First, the administrative sanctions that the secretary of state can impose under
4 the Act—i.e., a civil penalty of up to \$10,000 per violation and the return of disbursed
5 funds—do not constitute an affirmative disability or restraint. These sanctions
6 unequivocally do not approach “the infamous punishment of imprisonment,” *Kirby*,
7 2003-NMCA-074, ¶ 30 (internal quotation marks omitted), “which is the
8 paradigmatic affirmative disability or restraint.” *Smith v. Doe*, 538 U.S. 84, 100
9 (2003). Contrary to Block Jr.’s assertion that the civil penalty imposes an affirmative
10 restraint on a candidate’s ability to run for public office, any civil penalty imposed
11 by the secretary of state under the Act does not bar a fined candidate from continuing
12 his or her current campaign or from running for public office in the future. *See* § 1-
13 19A-17(A). As a result, the civil penalty carries neither the stigma nor the harsh
14 consequences of a criminal conviction on a candidate’s election-related activities.
15 *Kirby*, 2003-NMCA-074, ¶ 30; *see* NMSA 1978, § 31-13-1(A), (E) (2005) (stating
16 that, unless certain conditions are met, a person convicted of a felony cannot vote or
17 hold an office of public trust).

18 {39} Second, the civil penalty that may be imposed under the Act has not historically
19 been regarded as punishment and is instead traditionally viewed as a form of civil

1 remedy. *Kirby*, 2003-NMCA-074, ¶ 31 (Blackmun, J., concurring) (“[M]onetary
2 assessments are traditionally a form of civil remedy[.]” (quoting *United States v.*
3 *Ward*, 448 U.S. 242, 256 (1980)); see *Hudson*, 522 U.S. at 104 (“[N]either money
4 penalties nor debarment has historically been viewed as punishment.”)).

5 {40} Third, we conclude that the civil penalty does “not come into play *only* on a
6 finding of scienter.” *Kirby*, 2003-NMCA-074, ¶ 32 (emphasis added) (internal
7 quotation marks omitted). Section 1-19A-17(A) allows the secretary of state to assess
8 a civil penalty against any “person who violates a provision of the [Act]” without
9 regard to the violator’s state of mind or culpable intent. By contrast, Section 1-19A-
10 17(B) provides for criminal penalties only where the person has “willfully or
11 knowingly violate[d] the provisions of the [Act].” As a result, we view the penalties
12 provision of the Act to require a finding of scienter only in connection with the
13 imposition of a criminal penalty. To the extent that Block Jr. argues that a finding of
14 scienter comes into play for the civil penalty because “the secretary [of state] may
15 consider as a mitigating factor any circumstances out of the candidate’s control” in
16 determining whether a violation of Section 1-19A-17(A) has occurred, we are
17 unpersuaded. Because consideration of mitigating factors is a discretionary act—as
18 evidenced by the use of the word “may” in the statutory provision—we agree with the
19 State’s position that a civil penalty can be imposed under the Act even without

1 consideration of mitigating factors. *See* NMSA 1978, § 1-1-3 (1969) (stating that
2 “[a]s used in the Election Code, ‘shall’ is mandatory and ‘may’ is permissive”
3 (citation omitted)). Consequently, the civil penalty does not come into play *only* on
4 a finding of scienter, as required under the third *Mendoza-Martinez* factor. *Cf.*
5 *Hudson*, 522 U.S. at 104 (reasoning that consideration of the violator’s “good faith”
6 in determining the amount of the penalty to be imposed did not signify that the
7 penalty comes into play *only* on a finding of scienter because the “penalty can be
8 imposed even in the absence of bad faith”).

9 {41} Fourth, we consider whether the imposition of a civil penalty under the Act
10 promotes the traditional aims of punishment—retribution and deterrence. This Court
11 has previously recognized that it would be against common sense to conclude that a
12 “civil penalty [such as the one imposed by the Act] does not have some punitive and
13 deterrent aspects in its nature.” *Kirby*, 2003-NMCA-074, ¶ 33. But our Supreme
14 Court has emphasized that “[a]lthough a civil penalty may cause a degree of
15 punishment for the defendant, such a subjective effect cannot override the
16 legislation’s primarily remedial purpose.” *White Chevy*, 2002-NMSC-014, ¶ 11.
17 Similarly, we have stated that “the mere presence of [a deterrent] purpose is
18 insufficient to render a sanction criminal [for double jeopardy purposes], as
19 deterrence may serve civil as well as criminal goals.” *Kirby*, 2003-NMCA-074, ¶ 34

(internal quotation marks omitted). We therefore reject Block Jr.’s assertion that the civil penalty at issue here promotes only punitive purposes.

{42} We do not consider the negative effect of the penalty on Block Jr. to conclusively establish that the penalty constitutes “punishment” because, as previously noted, “whether a sanction constitutes punishment is not determined from the defendant’s perspective, as even remedial sanctions carry the sting of punishment.” *Schwartz*, 120 N.M. at 631, 904 P.2d at 1056 (internal quotation marks omitted). In addition, although the imposition of the civil penalty will likely deter future wrongdoing by other certified candidates, the civil penalty serves important non-punitive goals, such as promoting transparency in our state’s public campaign financing scheme, regulating the use of disbursed public funds by campaigns, and increasing public confidence in our state electoral system. *See Kirby*, 2003-NMCA-074, ¶ 34 (holding that although sanctions in the Securities Act had deterrent effects, the sanctions served important non-punitive goals, were remedial in nature, and were “plainly part of the director’s arsenal for regulation of persons dealing in the sale of securities . . . and [spoke] as much, if not more, to that regulatory challenge than to a sole need to punish”); *see also Hudson*, 522 U.S. at 105 (concluding that although the monetary sanctions at issue were “intended to deter future wrongdoing, [they] also serve[d] to promote the stability of the banking industry” and thus, “[t]o hold that the

1 mere presence of a deterrent purpose renders such sanctions ‘criminal’ . . . would
2 severely undermine the [g]overnment’s ability to engage in effective regulation”).
3 Because the civil penalty reasonably serves the regulatory goals of the Act and
4 protects the public, we conclude that any deterrent or punitive effects of the civil
5 penalty “are incidental to and do not override the Act’s and the civil penalty’s
6 primarily remedial purpose.” *Kirby*, 2003-NMCA-074, ¶ 34.

7 {43} Fifth, it is undisputed that the conduct upon which the civil penalties were
8 based also formed the basis of Counts 1 and 2 of Block Jr.’s indictment. However,
9 “although we answer this *Mendoza-Martinez* issue affirmatively, this fact is
10 insufficient to render the money penalties . . . criminally punitive . . . particularly in
11 the double jeopardy context.” *Kirby*, 2003-NMCA-074, ¶ 35 (alteration omitted)
12 (internal quotation marks omitted).

13 {44} Finally, we consider the sixth and seventh factors together: whether “there
14 exists an alternative, remedial, purpose to which the civil penalty may rationally be
15 connected” and whether “imposition of the civil penalty . . . appear[s] excessive in
16 relation to the [Act’s alternative] purpose” assigned. *Id.* ¶¶ 36-37. The district court
17 determined that the civil penalty was not earmarked for specific remedial purposes
18 and, further, that any remedial goals of the Act were accomplished by the
19 reimbursement aspect of Section 1-19A-17(A), which requires violators to return

1 disbursed funds to the secretary of state. On appeal, the State argues that the civil
2 penalty is connected to the alternative remedial purpose of “promoting openness and
3 honesty and keeping corruption out of New Mexico’s publicly financed election
4 campaigns.” It argues that the civil penalty is “integral to enforcing regulatory
5 compliance” with conditions imposed by the Act to protect these remedial interests.
6 The State further asserts that the civil penalty is earmarked for return to the public
7 election fund “for the purpose of . . . recouping administrative and enforcement costs.
8 Section 1-19A-15(B)(5) (directing the secretary of state to establish procedures for
9 the return of fund disbursements and “other money” to the public election fund);
10 Section 1-19A-10(A)(2) (stating that one purpose of the public election fund is
11 “paying administrative and enforcement costs” of the Act).

12 {45} We agree with the State’s position as to the sixth factor. It is clear that the civil
13 penalty is connected to the remedial purpose of protecting our state’s publicly
14 financed election campaign system from misappropriation and to insuring that public
15 funds are not subject to unlawful and deceptive practices. The use of the civil penalty
16 toward the administrative and enforcement costs of the Act serves that purpose. As
17 for the seventh *Mendoza-Martinez* factor, we conclude that the civil penalty is
18 integral to the remedial goals of the Act and that it does not appear excessive in
19 relation to these goals. The district court incorrectly determined that reimbursement

1 of disbursed funds would remedy any harm arising from violations of the Act because
2 reimbursement would not include the costs of an investigation and enforcement of the
3 Act. Moreover, “the Legislature chose to label the penalty a *civil* penalty.” *Kirby*,
4 2003-NMCA-074, ¶ 38. Although the label is not dispositive on the double jeopardy
5 analysis, *see id.* ¶ 29, the use of the term “civil” supports our interpretation of the
6 Legislature’s purpose in enacting the penalty.

7 {46} In summary, the *Mendoza-Martinez* factors indicate that the civil penalty is not
8 sufficiently punitive in its effect or purpose so as to outweigh its remedial effect.
9 This, in conjunction with the Legislature’s purpose in enacting the Act, leads us to
10 conclude that the civil penalty is not “punishment” for double jeopardy purposes
11 under the third *Schwartz* factor. It was therefore error for the district court to dismiss
12 Counts 1 and 2 against Block Jr. on double jeopardy grounds. As previously stated,
13 we also reverse the dismissal of Counts 3 and 4 against Block Jr. on double jeopardy
14 grounds because the conduct underlying those criminal charges and the secretary of
15 state’s previous action was not unitary.

16 **CONCLUSION**

17 {47} We hold that the Act does not limit the attorney general’s authority to initiate
18 criminal proceedings for violations of the Act. The attorney general is not required
19 to first receive a referral from the secretary of state before he or she can initiate

1 criminal proceedings. We also conclude that the civil penalty authorized under
2 Section 1-19A-17(A) of the Act is not considered punishment for double jeopardy
3 purposes and, thus, it does not preclude subsequent criminal prosecution for the same
4 conduct against which the civil penalty was assessed. Accordingly, we reverse the
5 district court's order of dismissal and remand with instructions to reinstate all charges
6 brought under the Act against Defendants.

7 {48} **IT IS SO ORDERED.**

8
9
10 **WE CONCUR:**

11
12 **JONATHAN B. SUTIN, Judge**

13
14 **RODERICK T. KENNEDY, Judge**


CYNTHIA A. FRY, Judge